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In the Supreme Court of the United States

October Term, 1969

No. 365

BRANN & STUART COMPANY,
Petitioner

vs.

CONSOLIDATED SUN RAY, INC.,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Pennsylvania entered in the above entitled case on April 23, 1969.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Common Pleas of Philadelphia County by Judge Barbieri (R. 57-71) is unreported and is printed in Appendix B hereto, *infra*, pp. 14-30. The majority opinion of the Supreme Court of Pennsylvania by Mr. Justice Cohen is printed in Appendix B hereto, *infra*, pp. 31-34. The dissenting opinion of the Supreme Court of Pennsylvania by Mr. Justice Roberts (joined in by Mr. Justice O'Brien) is printed in Appendix B hereto, *infra*, p. 35. Both opinions of the Supreme Court of Pennsylvania are reported in 433 Pa. 574.

JURISDICTION

The judgment of the Supreme Court of Pennsylvania was entered on April 23, 1969 (R. 2-5), pp. 31-34, *infra*. Reargument was denied on May 9, 1969 (R. 12), p. 43, *infra*.

The statutory provision believed to confer jurisdiction on this Court to review this judgment is 28 U.S.C.A. §1257(3).

QUESTIONS PRESENTED

1. Where petitioner notified the trial Court that its case was ready for trial and petitioner later filed a petition for special listing well within the statutory period for obtaining a verdict, does the arbitrary and unreasonable denial of the Court to list the case for trial within the required period violate petitioner's rights, privileges and immunities under the "due process" clause of the Fourteenth Amendment or deny petitioner equal protection of the laws provided by this Amendment?

2. Does the failure of the State of Pennsylvania to provide facilities and judges for trials in Philadelphia County where there are excessive backlogs of cases awaiting trial which preclude petitioner from obtaining a verdict within the required statutory period violate petitioner's rights, privileges and immunities under the "due process" clause of the Fourteenth Amendment or deny petitioner equal protection of the laws provided by this Amendment?

3. Is the five-year statutory period for recovering a verdict under the Pennsylvania Mechanics' Lien Act invalid as offending the "due process" clause or the "equal protection" clause of the Fourteenth Amendment where the administrative officers of the trial Court have arbitrarily and unreasonably denied listing of the case for trial and prevented recovery of a verdict within the required period?

4. Is the five-year statutory period invalid under the "due process" clause or under the "equal protection" clause where trial is prevented by the excessive backlog of untried cases in Philadelphia County?

STATEMENT OF THE CASE

Petitioner (sometimes referred to hereinafter as plaintiff with reference to the proceedings in the trial court), filed a mechanics' lien claim on January 31, 1961 against Consolidated Sun Ray, Inc., respondent. On June 2, 1961, a writ of scire facias issued as provided by the Mechanics' Lien Act of 1901, with respect to a mechanics' lien claim previously filed by petitioner. Subsequent thereto, six formal written motions were filed and argued. An appeal to the Supreme Court of Pennsylvania involving another defendant was also prosecuted. There was other extensive activity in the case due to the difficulties in gathering evidence and due to the financial problems of defendant for whom a conservator was appointed by the U. S. District Court for the Eastern District of Pennsylvania because it was unable to pay its debts.

On September 21, 1965, a praecipe for a nonjury trial was filed with the Deputy Administrator for civil listings. Jury trial was waived by both parties and petitioner's counsel was informed by the office of civil listings that the trial would begin within four to five months. This would have placed the trial not later than February, 1966, and clearly in ample time to recover a verdict by June 2, 1966, when the five-year statutory period for recovering a verdict under the Pennsylvania Mechanics' Lien Act of 1901 would possibly expire.

On April 25, 1966, when it became apparent that the case probably would not be reached for trial prior to the possible expiration of the five-year period, a peti-

tion for special listing, as provided under the Pa. R.C.P. 214(g), Appendix A, *infra*, p. 13, was filed with the Administrative Judge of the Philadelphia Court of Common Pleas. An answer opposing the petition for special listing was filed by counsel for defendant, Consolidated Sun Ray, Inc. The Administrative Judge denied the petition and the case came to trial November 14, 1966, before Judge Barbieri of Common Pleas Court No. 8.

At the outset of the trial defendant moved for judgment since more than five years had elapsed following the date of the issue of the writ of scire facias. Plaintiff in the argument before the trial court asserted that the arbitrary and unreasonable act of the Administrative Judge in denying a special listing offended the due process clause and the equal protection clause of the Fourteenth Amendment. It was also argued that the five-year statutory period of the Mechanics' Lien Act of 1901, if interpreted as to deny plaintiff an opportunity to be heard, would be invalid and unconstitutional under said provisions.

During the argument it was pointed out to the Court that crowded trial lists in Philadelphia as compared with adjoining Delaware County where the lists are current and other counties in Pennsylvania where the backlog is much less than in Philadelphia resulted in a manifest lack of due process and equal protection of the laws under the Fourteenth Amendment. Judge Barbieri's response to these arguments was that he did not believe they were involved in this case. At the outset of the trial, Judge Barbieri set forth his views as to the motion for judgment and again said he did not think due process was involved (R. 53). It was agreed by counsel for de-

fendant that the time required to argue the case before the trial court should not be counted in the five-year statutory period (R. 58).

Defendant's motion for judgment was denied by the trial court on the basis of the fact that stays of proceedings had extended the time necessary for recovering a verdict (R. 53). Trial on the merits proceeded and final judgment was entered for plaintiff in the amount of $152,620.10 plus interest from December 1, 1960 (R. 74-77). An extensive opinion by Judge Barbieri was filed supporting his position that the verdict or judgment had been recovered within the prescribed time, Appendix B, *infra,* pp. 14-30.

Defendant then appealed to the Supreme Court of Pennsylvania alleging that the time for recovering a verdict or judgment had expired. At the oral argument before the Pennsylvania Supreme Court the question of offending the Fourteenth Amendment was raised and argued by plaintiff. Appendix B, *infra,* p. 38. Nevertheless, the Supreme Court of Pensylvania reversed the lower court in a five to two decision holding that the statute must be followed whether strict, liberal or harsh, Appendix B, *infra,* pp. 31-34. The plaintiff then filed a petition for reargument alleging that the act of the Administrative Judge in denying a special listing was arbitrary and capricious and the affirmation by the majority of the Supreme Court resulted in a gross miscarriage of justice. The petition for reargument also alleged that the refusal of the Administrative Judge to grant the special listing violated the due process clause of the Fourteenth Amendment to the Constitution of the United States, Appendix B, *infra,* p. 38. An answer to the petition

for reargument was filed by defendant stating that all of the arguments and conclusions in the petition were presented to the Supreme Court in its brief and oral argument and that no relevant point therein was overlooked or misunderstood by the Pennsylvania Supreme Court, Appendix B, *infra,* pp. 41-42. The petition was denied, per curiam, May 9, 1969 (R. 12).

The original decision of the Supreme Court of Pennsylvania was the first effective denial of petitioner's Federal rights and those rights as to the due process clause were clearly asserted at the next opportunity in the petition for reargument. *Grannis v. Ordean,* 234 U.S. 385, 392; *Brinkerhoff-Faris Trust & Savings Co. v. Hill,* Mo. 1930, 281 U.S. 673.

REASONS FOR GRANTING THE WRIT

1. The act of the Administrative Judge of the Philadelphia Court of Common Pleas in failing to place this case on the nonjury trial list was undoubtedly an intentional, arbitrary and capricious act in view of his clear understanding that there was a five-year statutory period for obtaining a verdict which would expire chronologically 36 days after the petition was filed (R. 15, 44, 45). There are 30 judges in this court and there are judges from other counties and other Philadelphia Courts who are available to hear cases. The case was estimated to require no more than two days to try and, in retrospect, it actually required less than eight hours.

As explained, hereinbefore, a praecipe for a nonjury trial had been filed notifying the Deputy Administrator for civil listings that the case was ready for trial on September 21, 1965, more than eight months before the chronological date of expiration of the statutory period (R. 15, 42).

The act of the Administrative Judge was made effective when the majority of the Pennsylvania Supreme Court reversed the Court of Common Pleas which had overcome the effectiveness of his action by deducting the periods of stays of proceedings from the expired time and interpreting previous decisions of the Pennsylvania Supreme Court to mean that five-year period was merely "directory" and was met where there was "due prosecution", Appendix B, *infra*, pp. 14 to 30 and 31 to 34.

Reasons for Granting Writ

The authority of the Administrative Judge arises from the Rules of Civil Procedure which permit him to give preference to "such cases as the court upon cause shown may designate" (Pa. R.C.P. 214, Appendix A, *infra,* p. 13), and he is required to construe the rules to secure a "just, speedy and inexpensive determination" and "may disregard any error or defect of procedure which does not affect the substantial rights of the parties" (Pa. R.C.P. 126, Appendix A, *infra,* p. 13).

As stated in the *minority opinion* by Mr. Justice Roberts, the *majority opinion* of the Pennsylvania Supreme Court admits that the petition for special listing should have been granted. The minority opinion also observes that there was no finding of fault on the part of the plaintiff by the lower court in its failure to recover a verdict within five years, Appendix B, *infra,* p. 35. Actually, the lower court found that there was "due prosecution" of the claim, Appendix B, *infra,* pp. 14-30. The record shows nothing to support any lack of diligence by plaintiff, especially since a praecipe to list the nonjury case for trial and petition for special listing were filed as set forth above. No appeal or other action could be taken at the time of the denial of the special listing since that act was not a final judgment.

The act of the Administrative Judge in denying the listing was so flagrant a denial of due process as to offend almost anyone's sense of fairness and is certainly less than acceptable conduct as commonly experienced. *Breithaupt v. Abram,* N.M. 1957, 352 U.S. 432. The refusal of the listing was the act of a state's authorized agent denying a full and fair hearing. *Brinkerhoff-Faris Trust & Savings Co. v. Hill,* 281 U.S. 673. The hearing that was eventual-

ly held was rendered ineffectual by the Pennsylvania Supreme Court when it held that the statutory period elapsed prior to the hearing. There was thus no opportunity to be heard at a meaningful time and in a meaningful manner due to the acts of the Administrative Judge and of the office of civil listings of the lower court. *Armstrong v. Manzo,* 380 U.S. 545, 552 (1965); *Hutton v. Fisher,* 359 F. 2d 913, 919.

The action of the Administrative Judge, being an unreasonable discrimination, offends the "equal protection" clause as well. *Howard Sports Daily v. Weller,* 1941, 18 A. 2d 210, 179 Md. 355. The granting of a special listing is in effect a matter of grace in the Philadelphia County Courts of Common Pleas and does not meet the standard of an opportunity to be heard given as a matter of right. *Coe v. Armour Fertilizer Works,* 237 U.S. 413. The five-year statutory period is invalid as administered because of inequality and unfairness in such administration. *Montgomery v. Suttles,* 1941, 13 S.E. 2d 781, 191 Ga. 781; *Yick Wo v. Hopkins,* Cal. 1886, 118 U.S. 356, 373.

2. The backlog of cases in the courts of our big cities represents one of the most pressing and depressing problems that exist in those beleaguered and lamented areas of our country. The importance of this case is striking in the opportunity to begin alleviation of this condition.

Judge Barbieri, in the lower court opinion, states, and Mr. Justice Roberts in the minority opinion quotes with approval:

> ". . . the mechanic's lien . . . could be nullified in almost every case in Philadelphia County by the

simple expedient of ordering it on the trial list for jury trial (unless the Court Administrator chooses to grant a special listing), since the Philadelphia jury trial list as it is now functioning requires more than five years after the motion for trial until trial can be had." (Appendix B, *infra*, pp. 19-20).

There can be no question that the initial reason the case was not listed in due course was the backlog of cases in the Philadelphia Court of Common Pleas although the Administrative Judge had a duty to correct the situation by special listing. The delay from the time the praecipe for listing was issued was in itself a discrimination in view of the fact that no other county in Pennsylvania has this backlog. In oral argument before Judge Barbieri it was pointed out that adjoining Delaware County, for example, had no waiting time and was current with respect to its jury and nonjury trial list. The discrimination and lack of equal protection to the residents and others required to use the Courts of Common Pleas of Philadelphia County as compared to residents and other persons required to use the courts of other counties in Pennsylvania is a fact beyond dispute and has been for many years.

The State of Pennsylvania has not met its obligation to those persons in Philadelphia and has violated petitioner's rights as to equal protection of the laws and due process. There is obviously within the State of Pennsylvania a class of persons, residents and others using the Courts of Philadelphia County, needing aid or further aid to secure equal treatment under the law.

The right to be heard in a meaningful manner, whether by jury or nonjury trial, receives different treatment elsewhere in Pennsylvania but is not based on a

reasonable classification. The guarantees of the Fourteenth Amendment have thus been violated. *Hernandez v. State of Tex.*, Tex. 1954, 347 U.S. 475; *Shelley v. Kraemer*, Mich. and Mo. 1948, 334 U.S. 1.

The case now before the Court is only one of the many problems that have arisen from discrimination against the large cities resulting from failure of the states to give to residents and other users of these cities protection of the law. The door should be opened, and can be, by attacking the problem in this case.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES OF CIVIL PROCEDURE

1. Pennsylvania Mechanics' Lien Act of 1901, Section 10:

". . . The claim must be filed in the court of common pleas of the county or counties in which the structure or other improvement is situate, . . . upon it a writ of scire facias must issue . . .; and a verdict must be recovered or judgment entered on the scire facias within five years after it is issued. . . . If a claim . . . be not prosecuted in the manner and at the time aforesaid, it shall be wholly lost." (1901; June 4, P. L. 431, Section 10)

2. Pennsylvania Rules of Civil Procedure:

"Rule 214. Preferences shall be given in the preparation of trial lists to:

". . . (g) such cases as the court upon cause shown may designate."

"Rule 126. Liberal Construction and Application of Rules. The rules shall be liberally construed to secure the just, speedy and inexpensive determination of every action or proceeding to which they are applicable. The court at every stage of any such action or proceeding may disregard any error or defect of procedure which does not affect the substantial rights of the parties."

APPENDIX B-1

IN THE COURT OF COMMON PLEAS NO. 2
OF PHILADELPHIA COUNTY
(Tried in Common Pleas No. 8)

No. L228 (MLD) December Term, 1960

Brann & Stuart Company

vs.

Consolidated Sun Ray, Incorporated

and

Philadelphia Redevelopment Authority

OPINION

Barbieri, J.

The claim in this mechanics lien action was filed in the Philadelphia Common Pleas Court on January 31, 1961, under the Mechanics Liens Act of June 4, 1901, (P. L. 431, 49 P.S. 1, et seq.). The lien is for $177,060.-10. During its pendency a reenactment of the mechanics liens laws was passed on August 24, 1963 (P. L. 1175, 49 P.S. 1101, et seq.), designated by the legislature as the "Mechanics' Lien Law of 1963". This act repealed the 1901 law, but, while its substantive new provisions

are not applicable to liens filed prior to its passage, its procedural changes are.[1] This provision, Section 802 (49 P.S. 1802), reads:

> "This act shall take effect on the first day of January, 1964, but shall not apply to liens filed prior to said date except with respect to the practice and procedure prescribed by Article VII of this act." 1963, Aug. 24, P. L. 1175, No. 497, art. VIII, Sec. 802.

Defendant invokes a provision in Section 10 of the Act of 1901, now Section 701(d) in the 1963 Act,[2] contending that plaintiff's lien rights have been lost because no verdict was obtained by it during the applicable limit of five years, computed under either statutory version. The 1901 provision, Section 10 of that Act, provides:

> ". . . and a verdict must be recovered or judgment entered on the scire facias within five years after it is issued. Final judgment must be entered on the verdict within five years after its recovery."

The 1963 version, subsection (d) of Section 701,[3] reads:

> "(d) Limitation on Time of Obtaining Judgment. A verdict must be recovered or judgment entered within five (5) years from the date of filing of the claim. Final judgment must be entered on a verdict within five (5) years. If a claim is not prosecuted to verdict or judgment, as provided above, the claim shall be wholly lost."

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[1] See McCarthy v. Reese, 419 Pa. 489, 490 (1965).

[2] 49 P.S. 1701(d).

[3] 49 P.S. 1701(d).

Although the writ was not issued in this case until June 2, 1961, the difference in the two legislative provisions as to when the five year period begins to run is not of decisive importance, because the trial stage was not reached until November 16, 1966. It was then, when the case was first ready to be tried, that the defendant moved for judgment in its favor on the ground that the lien had been "wholly lost" by the lapse of the five year period allowed under either statutory provision. On the last day of the trial, it was agreed that the limitation question be briefed after the notes of testimony were transcribed, and that any delay after that date, November 21, 1966, should not be charged against the plaintiff.

Other provisions of Article VII, the procedural article in the 1963 Act, which could be retroactively applicable, may have significance on this limitations issue, particularly since defendant's theory is based upon appellate decisions which were construing certain procedural provisions of the 1901 Act which have either been repealed, or are no longer acceptable under current Rules of Civil Procedure promulgated by our Supreme Court.[4] Thus, defendant relies mainly upon the 1910 case of Sterling Bronze v. Syria Improvement Association, 226 Pa. 475. That decision is the keystone of the defendant's contention that, regardless of fault or regardless of whether or not the plaintiff has diligently pursued what amounts to "due prosecution", the defendant may sit on its hands and even may indulge in procedural tactics which, although meritoriously initiated and carried on, do account for much of the passage

[4] Pa. R. C. P. 1651-1660.

of time, and yet, unless a verdict and judgment are obtained within five years of the date of filing the mechanics lien claim or the writ of scire facias, the entire proceeding fails and the plaintiff's lien is lost. It is fervently hoped that this inexorable form of jurisprudence, like the law of the Medes and Persians, is a thing of the past.

In support of its position, the defendant does charge the plaintiff with a failure to prosecute diligently, pointing out that when the defendant attacked its complaint it took the plaintiff a year and one-half to file an amended claim; that it took the plaintiff two months to reply to new matter at one stage; that it was the plaintiff who appealed from an order in favor of another defendant, now out of the case,[5] and by the time the Supreme Court had handed down its decision there had been a great deal more time consumed, so that the claim filed on January 31, 1961 was at the Supreme Court decision stage on October 10, 1963; that thereafter the plaintiff did not put the case down for trial until September 21, 1965, which was approximately two years after it had the right to move for trial following the Supreme Court's decision. In fact, defendant points out, Sun Ray even agreed to waive a jury trial which would avoid delay and should have expedited the opportunity for trial. Defendant contends that the plaintiff slept on its rights until April 21, 1966, when it requested a special listing. If the rule contended for by defendant under Sterling was

[5] The motion for judgment on the whole record, granted in favor of the Philadelphia Redevelopment Authority, the other former defendant, was sustained by the Supreme Court, 412 Pa. 288 (1963).

to be applied here, the plaintiff then had only from April 21, 1966 until June 2, 1966 to try its case, obtain a verdict, and bring this to judgment.[6] Plaintiff's efforts at this stage were frustrated when a special listing was refused on the opposition of the defense, so that the matter never did get the opportunity to be tried until it came before the undersigned on November 16, 1966. If the defendant's position is sound, plaintiff had lost its right to perfect the lien and this Court should not have permitted a trial to take place. Plaintiff contends, however, that even if the principles in Sterling should still be the law in Pennsylvania, some, if not all, of certain stay time resulting from court action should be subtracted from the period of five years, in which event there remained adequate time for trial and judgment within the five years' period under any construction of either statute. It is at once apparent that, either the hard rule contended for by the defendant has outlawed the claim, or that delaying circumstances which are part of the every day incidents of ligitation must be discounted in order to effect a mechanics lien solution that is sensible in the light of the inevitable delays of modern day proceedings and current litigation problems in Philadelphia.

At first blush also, the position of defendant appears to be entirely unconscionable, particularly if defendant contends that the delays caused by its activities are not to

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[6] If the 1963 version were applicable, under defendant's view the plaintiff's lien time had already expired on January 31, 1966. See McCarthy v. Reese, 419 Pa. 489, 490 (1945). For a situation, as here, where the retroactive legislation shortens the limitations period, see Strouse v. Quaker Knitting Mills, Inc., 159 Pa. Superior Ct. 39 (1946).

be deducted from the period of five years. The effect of defendant's position, if acepted and carried to its logical extreme, would be to sanction dilatory tactics as a means to deprive a mechanics lien claimant of a right which the statute would otherwise give him. Furthermore, there is the equitable consideration that those whose services and materials go into the construction of a building should be privileged to rely upon a statutory lien remedy as against the property of an owner who becomes incapable or unwilling to otherwise make payment for such labor and materials which are now included in his building. It is not in the best interest of business as it is carried on in modern days to enforce a doctrine which would grant to the defendant the relief from the lien which it requests in this case. Should mechanics liens become so readily rendered worthless, such a result would surely disadvantage those who must have credit to finance the work and materials which are used in the erection of buildings.[7]

Be that as it may, if it is actually the legislative intent to grant a strictly limited lien, which can be lost to the lienor through no fault of his, and even if he has acted diligently to obtain and preserve it, this intent must be recognized in the decision reached herein. Such a decision would be made with great reluctance, however, principally because to do so would be to reach the kind of absurd result that should not be attributed to the legislature. In other words, the mechanics lien which is sought to be provided by the Act of 1901, as amended, could be nullified in almost every case in Philadelphia County by the simple expedient of ordering it on the trial list for

[7] The defendant herein is presently in financial difficulties.

jury trial (unless the Court Administrator chooses to grant a special listing), since the Philadelphia jury trial list as it is now functioning requires more than five years after the motion for trial until a trial can be had. When the Legislature reenacted the law in 1963, it may be presumed to have been aware of two things: (1) That five years is a very brief time for the course of litigation in Philadelphia in which to accomplish the trial, verdict and judgment required to maintain and perfect the lien, and (2) that there existed a more recent decision than that in the 1910 Sterling case, one that was rendered by our Supreme Court in 1938, in the case of Rosenheck v. Stape, 332 Pa. 287. In that case our Supreme Court was approving the language of Judge Cunningham in the Superior Court (130 Pa. Superior Ct. 357—1938), wherein Judge Cunningham was dealing with a case in which there had been due prosecution of the mechanics lien proceeding, with a resulting verdict within the period of five years, but the judgment on the verdict was not entered until after the five year period had expired. Judge Cunningham, in refusing to grant the defendant's request that the judgment be stricken off under a strict interpretation of the language in Section 10 of the Act of 1901, reasoned that: "If we are correct in our view of the prior decisions, the most that can be said of Section 10 of the Act of 1901 is that it is a legislative declaration of what will constitute due prosecution of the writ." The Pennsylvania Supreme Court approved Judge Cunningham's liberal interpretation of the limitation, stating (Page 288):

> "The judgment is affirmed on the able opinion of Judge Cunningham of the Superior Court, 130 Pa. Superior Ct. 357. In answering the question of

that court, we hold that Ward v. Patterson, 46 Pa. 372; Hershey v. Shenk, 58 Pa. 382, and Hunter v. Lanning, 76 Pa. 25, *are merely examples of what did not amount to due prosecution,* and the Superior Court was correct in so intimating.

"Section 10 of the Mechanics' Lien Act of June 4, 1901, P. L. 431, here in controversy, is merely a legislative declaration of what constitutes due prosecution of the writ of sci. fa." (Emphasis added.)

Defendant herein has relied mainly on Sterling and has made no attempt to distinguish, or otherwise comment upon, this language in the much later Rosenheck decision. A look at the Sterling case reveals that there was certainly a failure in that case of the "due prosecution" referred to in Rosenheck, since, as the Sterling opinion points out, the lien in that case was filed on February 6, 1903 and the sci. fi. was issued on the same day, but no "jury was called" until November 10, 1908, which was more than five years after the lien had been filed and the sci. fi. issued. It is evident that the plaintiff there sat back, maintaining its lien on the property of the defendant, and simply slept on its rights for the full five years, while continuing to burden defendant's real estate. A reasonable rationalization of both cases would seem to be that a mechanics lien plaintiff may not *unfairly* encumber and otherwise impair the property rights of a real estate owner beyond five years. To earn the privilege of continuing his lien rights beyond the five year period, it is incumbent upon him to show due prosecution of his right to so extend the lien time. In Sterling, the following language is perhaps significant: "There can be no doubt of the legislative intention

to require *reasonable diligence* in the prosecution of claims of this character because the Act has definitely fixed the period in which such a lien may be filed, a verdict recovered and judgment entered. . . . The appellant failed to meet the statutory burden. . . ." (Emphasis added). There seems little doubt that the plaintiff in Sterling failed to make any effort to meet the statutory burden and was obviously guilty of a failure to exercise "due prosecution of the writ."

If Sterling does not support defendant because it is reasonably distinguishable, there seems to be no authority that does. It must be conceded that there is dictum in the recent case of Berman v. Herrick, (424 Pa. 490—1967), which may have significance in favor of the defendant in this matter, but it must be pointed out that the Berman opinion is dealing with circumstances not at all like those in this case. Mr. Justice Cohen was speaking for the Court in ruling upon the right of the defendant to amend its affidavit of defense to include certain defenses. In sustaining the defendant's appeal and its right to amend, Mr. Justice Cohen notes that, since the action was commenced on January 24, 1961, "appellee has only until August 23, 1967 to obtain judgment." He further stated: "'A significant difference is present in the instant matter simply because this is a mechanics lien case and unless the appellee has the opportunity to prove his case at trial and take judgment by August 23, 1967, he will suffer the ultimate prejudice by losing his day in court.' Although this language supports the view of defendant herein, there is no indication of what the circumstances were in that case, and it certainly cannot be assumed that the position of the plaintiff therein was

the same as in this case. Indeed, it may be reasonably concluded that Mr. Justice Cohen was merely attempting to further the "due prosecution" described in Rosenheck, since his opinion concludes: "'Accordingly, we will allow the amendments and remand the case to the lower court with instructions to the Administrative Judge to have this case listed and tried as expeditiously as possible.'" Under the influence of Mr. Justice Cohen's "instructions to the administrative judge", the Berman case was tried to a verdict within the statutory period on a special listing. As is previously noted, the same situation was presented in this case approximately one year earlier, but defense counsel herein, the same defense counsel as in Berman, opposed this plaintiff's request for a special listing and the petition was dismissed, whereby the last hope for plaintiff to possibly come within even the 1901 version of the limitation period was frustrated.

Considering now the applicable procedural changes wrought by the Act of 1963, we note that procedure to obtain a judgment in mechanic liens cases is now governed by the Pennsylvania Rules of Civil Procedure as ". . . promulgated by the Supreme Court".[8] Pa. R. C. P. 1651, pertinently to the issue under consideration, provides that the procedure to obtain judgment ". . . shall be in accordance with the rules relating to the action of assumpsit." It may be concluded from this that the plaintiff herein is entitled to the liberality of consideration that prevails in assumpsit actions.

More significant, however, and perhaps conclusive on the question of the legislative intent in reenacting the

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[8] 49 P.S. 1701(a). See Pa. R. C. P. 1651-1660.

law in 1963, is the elimination of the clause that called for the strict construction of the limitation in Section 10 of the 1901 Act. This clause appears in Section 51 of the 1901 Act, which reads in pertinent part as follows:

> "The court may, for cause shown and filed of record, enlarge the time for requiring the filing of the claim, affidavit of defense, answer or replication, for issuing a scire facias, or for entering security, by rule or special or standing order; . . ."
> ". . . *but no enlargement of the time* for requiring the filing the claim or for issuing a scire facias *shall extend the same beyond the time herein provided for preserving or retaining the lien thereof.*" (Emphasis added.)

This clause, calling for the kind of strict construction that courts have applied to the five years' limitation, was eliminated from the 1963 reenactment, and, since we are not free to assume that this change was a purposeless, or merely inadvertent, act of the legislature, we feel more comfortable in our decision to apply what we consider a just, if somewhat more liberal, view than that contended for by defendant.

There can be little doubt that the time consumed on an appeal, which it was certainly the duty of plaintiff's counsel to take in this case, should not be included in the period of five years. During this appeal delay of about ten months, the plaintiff could not know against whom to proceed, because the appeal was taken to question the lower court's action in dismissing the case as to another defendant, Philadelphia Redevelopment Authority. But aside from this, the plaintiff was faced with

the positive incapacity to make any move at all at the trial level, for it has long been the law of this Commonwealth that ". . . a court of first instance is without jurisdiction to proceed with a cause after the record thereof has been removed to an appellate court." Sowers Estate, 383 Pa. 566, 573 (1956); Gilbert v. Lebanon Val. St. Ry. Co., 303 Pa. 213 (1931); Silver v. Edelstein, 266 Pa. 531 (1920).

As to the question of whether or not the periods of inactivity due to stays ordered by the court at the instance of plaintiff and the defendant should be deducted from the five years, we note that *"An order to stay proceedings puts an end to all action, and no steps can be taken lawfully during its continuance";* 40 Words and Phrases, "Stay of Proceedings" 191. Would not any litigant who attempted to proceed in defiance of such an order subject himself to the charge that he so acted in contempt of court? Unless such orders can be made and respected, would not the affairs of litigants be more hopelessly involved in chaos than they already are?

In any event, even if we accord to the plaintiff that relief from delay which was solely caused by action of the defendant, granting indulgence for only the period of the stay order granted on *defendant's* request, we must deny the defendant's motion for judgment. Thus, on June 12, 1961, at defendant's request, a rule for more specific claim was granted with a specific order by the court that "all proceedings to stay meanwhile". This stay was in effect until June 13, 1961, a period of just over a year. If this year is deducted from the period in question, plaintiff had time to try his case to a verdict

until June 2, 1967 under the 1901 Act, and until January 31, 1967 under the 1963 reenactment.[9]

Support for the elimination of this one year of stay time, regardless of other stay or appeal time, is supported by the only case that has precisely dealt with this question, the case of A. & C. Construction Co. v. Maloof, 17 Monroe Legal Reporter 34 (1955). In that case, the court gave the plaintiff the benefit of stay time requested by the defendant, stating (pages 35-36):

> "In the Howes & Bros. case, supra, the plaintiff was prevented from proceeding to judgment by reason of the pending motion for new trial. In the instant case the plaintiff was prevented from proceeding to verdict or judgment by reason of the order of court staying all proceedings. If either plaintiff or defendant had acted promptly on the motion to strike, in all probability the stay of proceedings would have been removed in time to proceed to verdict or judgment within the time alloted by the statute, but the fact remains that it was not done and the stay of proceedings remained.
>
> "No case directly in point has been cited by counsel on either side and very little Pennsylvania law has been cited construing the effect of a stay of proceedings order by the Court. We are inclined to believe that it has been so generally recognized in this state by the Bench and the Bar that a stay of proceedings order means that everything in relation to the proceedings is stayed, so that the parties are

[9] It will be recalled that the running of the limitation after November 21, 1966 has been waived by the defendant.

in the same position when the stay is ended as they were when it was entered, that the matter has not been before the courts.

"The plaintiff was shackled by the court at the instance of the defendant and now the defendant asks the court to declare a technical knockout before the shackles are removed. This we will not do."

The conclusion is inevitable, therefore, that the plaintiff has not "wholly lost" its lien right by the mere passage of time, even if only on the theory that the defendant's stay time must be deducted, and that we are required to consider other possible defenses raised by the defendant.

Defendant also offers in support of its motion for judgment the contention that the lien claim was not filed in time under that provision in Section 10 of the 1901 Act which requires filing "within three months after the claimant's contract or agreement is completed," a time limitation that applies when the defendant is the holder of only a leasehold interest in the real estate. Contending that defendant did have solely a lease interest, and that the work completion date was August 1, 1960, defendant asserts that the claim herein could not have been filed in time. The plaintiff's answer is that the last item of work was performed on November 16, 1960, so that the claim on January 31, 1961 was within the three months' period; and that, even if the last work was moved back to one of the dates contended for by defendant, August 1, 1960, the lien would still not be filed too late, because plaintiff could properly invoke the six months' rule which applies where the work is done

for one with ownership or equitable interest rather than simply a leasehold interest.

Reference to the contract between the plaintiff and defendant reveals that defendant did not in fact have a simple leasehold interest; that the agreement provided for a stated term of 30 years, renewable for an additional 20 years, and also contained a purchase option in favor of the defendant. Also, the construction agreement of December 24, 1959, contains clear indications of the creation of an equitable real estate interest in the defendant. Taking it all in all, it is unquestionably clear that the defendant had an ownership interest in the land of sufficient significance that the period of six months was available to plaintiff for filing its lien, rather than the three months' period contended for by the defendant. See People's Street Ry. Co. v. Spencer, 156 Pa. 85 (1893); Weaver v. Sheeler, 124 Pa. 473 (1889); Gaule v. Bilyeau, 25 Pa. 521 (1855); Cushman, The Law of Mechanics Liens in Pennsylvania, Pages 61 and 772.

It may be added that in the testimony it is established that substantial work was performed during September and October of 1960, so that there can be no question that the claim was timely filed on January 31, 1961 as being well within the period of six months.

Furthermore, even if the defendant's interest was a simple leasehold, it would still have to be conceded that there was work done within three months prior to January 31, 1961. Certain repair work was done because of construction activities of the drainage subcontractor, so that changing elevations on certain catch basins and drains necessitated work by plaintiff in the nature of

patching and repairs. These repairs were requested by defendant and were not caused by mistakes attributable to the plaintiff. Regardless of whether the plaintiff's paving work had been finished at that time, the circumstances were such as to render incomplete and unacceptable what had been done, so that the subsequent work, whether it was performed as a change or extra in the light of the original contract, or as part of that original undertaking, was so interconnected with the original undertaking that it is reasonably treated as an extension thereof. Also, we find no basis for concluding that any of the work done by the plaintiff was in the form of a gratuity.. Under all of the circumstances, the time for filing the mechanics lien did not begin to run until the extra work was completed. See Rush v. Able, 90 Pa. 153 (1879); Parrish's Appeal, 83 Pa. 111 (1876); Johns v. Bolton, 12 Pa. 339 (1849).

Accordingly, the extended work referred to having culminated in a final item on November 16, 1960, the claim filed on January 31, 1961 was fully within the period of three months allowed for liens against simple leasehold interests.

Lastly, defendant contends that the lien is defective because the work was not furnished on the credit of the building. The argument is not clear, but the testimony covers the situation and fully affirms the reliance by plaintiff upon the defendant as an equitable owner of the warehouse in question.

Accordingly, defendant's motion for judgment is denied and leave is granted it to present such testimony

as it may desire to introduce on the merits of the case.
Filed: December 15, 1967.

(s) Barbieri,
J.

APPENDIX B-2

IN THE SUPREME COURT OF PENNSYLVANIA
Eastern District

No. 149 January Term, 1969

Brann & Stuart Company

v.

Consolidated Sun Ray, Incorporated

and

Philadelphia Redevelopment Authority

Appeal of Consolidated Sun Ray, Incorporated

Appeal from Judgment of the Court of Common Pleas No. 2 of Philadelphia (Heard in Common Pleas Court No. 7)

OPINION OF THE COURT

Cohen, J., Filed: April 23, 1969:

On January 31, 1961 Brann & Stuart, appellee, filed a mechanic's lien against Consolidated Sun Ray, Inc., ap-

pellant. Appellee claimed a balance allegedly due pursuant to an oral and written contract with appellant for labor and material furnished in the construction of a warehouse.

On June 21, 1961, appellee issued a *Sci. Fa.* Pretrial motions occasioned five stays, four of which were granted on application of appellee and one stay was granted on application of appellant. Other delays occurred, such as a prior appeal by appellee to the Supreme Court and failure of appellee to proceed diligently, causing a considerable lapse of time.

On April 21, 1966, appellee recognizing the impact of Section 10 of the Act of 1901, P. L. 431, 49 P.S. §52, filed a petition for special listing with the administrative judge of Philadelphia County which should have been granted but was denied. The action came to trial on November 16, 1966. Before any testimony was taken, appellant filed a motion for judgment in its favor on the theory that the lien had been lost because appellee had failed to recover a verdict on its claim within five years from the date of issue of the *Sci. Fa.*, as required by Section 10 of the Mechanics' Lien Law of 1901.[1] The trial judge nevertheless permitted testimony to be offered on behalf of appellee, after which appellant renewed its motion for judgment which was subsequently denied and judgment was then entered in favor of appellee. It is that final judgment from which the present appeal has been taken.

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[1]The Act of Aug. 24, 1963, P. L. 1175, No. 497, Art. VII, §701, 49 P.S. §1701(d) reduces the period to five years from the filing of the claim.

As recently as Murray v. Zemon, 402 Pa. 354, 358 (1960), Mr. Justice Eagen said:

> "We must always bear in mind that this is not a common law action, but rather a claim to assert a peculiar type of lien against real estate under the provisions of a statute, strict compliance with which has always been demanded. Such liens are purely creatures of statutes; they did not exist at common law. Consequently, they are available only on such terms as the Legislature saw fit to provide: . . ."

What Justice Eagen said had been said innumerable times before, both by this Court and the Superior Court. Every practitioner has recognized that strict compliance with Mechanics' Lien Law is necessary in order to effect a valid claim. In Hunter v. Lanning, 76 Pa. 25 (1874), where more than five years had elapsed since the filing of the lien and issuing of a *Sci. Fa.*, it was held that since judgment had not been obtained within five years from the issuing of the writ, the lien was gone. Kountz v. Consolidated Ice Co., 36 Superior Ct. 639 (1908), where more than five years had elapsed as required by the Act of June 16, 1836, P. L. 695, held that judgment must be obtained within five years from the issuance of the writ. See, Berman v. Herrick, 424 Pa. 490, 227 A. 2d 840 (1967).

The right to a mechanic's lien is purely a creature of statute and it is only available if the conditions of the legislature are strictly followed. Where the words of the statute are clear, the courts should not be requested to go beyond the requirements of the act to determine who was or who was not dilatory and responsible for the

delay. It must be assumed that the legislature took delays, regardless of source, into account when it established the five year limitation. The statute must be followed whether strict or liberal, harsh or equitable.

Judgment reversed.

Mr. Justice Roberts files a Dissenting Opinion, in which Mr. Justice O'Brien joins.

DISSENTING OPINION

Roberts, J., Filed: April 23, 1969:

I dissent from the majority's use of an absolute rule requiring a lien-holder to recover a verdict on its claim within five years from the date of issue of the *Sci. Fa.* As the lower court properly pointed out, under the rule adopted by the majority, "the mechanics lien . . . could be nullified in almost every case in Philadelphia County by the simple expedient of ordering it on the trial list for jury trial (unless the Court Administrator chooses to grant a special listing), since the Philadelphia jury trial list as it is now functioning requires more than five years after the motion for trial until a trial can be had." Furthermore, the majority concedes that appellee "filed a petition for special listing . . . which should have been granted but was denied." I cannot believe that the Legislature intended to put lien-holders at the complete peril of delays which are either fortuitous or inherent in the judicial system as it presently operates. A more sensible reading of the five year requirement would bar a lien-holder only if the reason for his not recovering a verdict within five years was due to his own fault. Since the court below found no such fault, and since I do not believe that such a finding is compelled by the record before us, I would affirm the judgment in favor of appellee.*

Mr. Justice O'Brien joins this opinion.

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* In accordance with appellee's agreement at oral argument, I would modify the judgment to be in rem only.

APPENDIX B-3

IN THE SUPREME COURT OF PENNSYLVANIA
Eastern District

No. 149 January Term, 1969

Brann & Stuart Company

vs.

Consolidated Sun Ray, Incorporated,
Appellant

and

Philadelphia Redevelopment Authority

Appeal of Consolidated Sun Ray, Incorporated

Appeal from Judgment of Court of Common Pleas No. 2 of Philadelphia (Tried in Common Pleas Court No. 8)

PETITION FOR REARGUMENT

To the Honorable, the Justices of the Said Court:

The petition of Brann & Stuart Company, plaintiff-appellee, respectfully prays your Honorable Court to grant

a reargument of this appeal, and in support thereof, respectfully submits the following:

1. This was an appeal by Consolidated Sun Ray, Inc., defendant-appellant, from the judgment of the Court of Common Pleas No. 2 of Philadelphia on a verdict in favor of the plaintiff by Judge Barbieri of Common Pleas Court No. 8. The action involved a mechanic's lien claim and the only unresolved question on appeal was whether or not the five-year period of limitations for recovery of a verdict under Section 10 of the Mechanics' Lien Act of 1901 precluded the verdict and judgment in favor of plaintiff, Brann & Stuart Company in the court below.

The Supreme Court of Pennsylvania on April 23, 1969, rendered an opinion reversing the judgment of the Court of Common Pleas of Philadelphia County in an opinion by Mr. Justice Cohen to which a dissenting opinion was rendered by Mr. Justice Roberts in which Mr. Justice O'Brien joined.

2. The majority of the Supreme Court failed to consider that the act of the Administrative Judge in denying a special listing was arbitrary and capricious in the circumstances of this case and the affirmation thereof by the majority of the Supreme Court resulted in a gross miscarriage of justice. It is respectfully suggested that the action of the majority is contradictory in that the opinion states affirmatively that the petition should have been granted by the Administrative Judge. This becomes crystal clear since there were yet 36 days remaining before the expiration of the five-year period. This nonjury case could have been concluded without interfering with other cases on the trial list which had no similar im-

mediate urgency. As a matter of fact the actual trial time of this case was less than eight (8) hours.

3. The majority of the Supreme Court failed to consider that the refusal of the Administrative Judge to grant an emergency listing violated the due process clause of the 14th Amendment to the Constitution of the United States and Article I, Section 11 of the Constitution of the Commonwealth of Pennsylvania. The question of due process was urged orally in the lower court and in your Honorable Court. At oral argument before this Court, Hutton vs. Fisher, 359 F. 2d 913 (1966) was referred to extensively; particularly:

> "Matters involving large sums should not be determined by default judgment if it can reasonably be avoided . . ."

and:

> "A fundamental requirement of due process is 'the opportunity to be heard' . . . it is an opportunity which must be granted at a meaningful time and in a meaningful manner."

4. The majority of the Supreme Court failed to recognize that there was no finding in the lower court of a lack of diligence on part of plaintiff, and that the unwarranted finding by the majority of your Honorable Court resulted from grossly inaccurate statements of counsel for defendant. (Appellant's brief, pages 16, 18 and 23.) All of this was effectively answered by plaintiff. (Appellee's brief, pages 10 to 16.)

5. The majority of the Supreme Court failed to consider that under equitable principles the judgment could be opened at the discretion of the lower court and that

the statutory period is not absolute under the expressed provisions of the Mechanics' Lien Act (Section 51) in that it provides for opening of judgment by default.

In plaintiff's brief (page 7), Williamsport Nat. Bank v. Kreamer, 230 Pa. 515 (1911) was cited and this case clearly holds that under the rules of court a statutory period may be extended at the discretion of the court and a judgment of non-pros. against a plaintiff may be opened under equitable principles. This was pointed out at oral argument before the Supreme Court. Also quoted from at oral argument was Kantor vs. Herd, 276 Pa. 519 (1923), which holds that a judgment in a mechanic's lien action may be opened under *equitable principles* whether it is by default or otherwise.

6. The majority opinion failed to consider that the interpretation of the five-year period in Section 10 of the Mechanics' Lien Act as absolute is repugnant to the Constitution of the Commonwealth of Pennsylvania as set forth in Rosenheck vs. Stape, 332 Pa. 287 (1938), which states that Section 10 of the Mechanics' Lien Act "is *merely a legislative declaration* of what constitutes due prosecution of a writ of sci. fa. It is therefore not special legislation repugnant to the Constitution." (Underscoring [italics] supplied.) (Plaintiff's brief, page 8.)

Wherefore, your petitioner prays that this Honorable Court grant a reargument in this appeal.

William F. Scheid, Jr.
S. Regen Ginsburg
Attorneys for Petitioner

Commonwealth of Pennsylvania
County of Philadelphia ss:

William F. Scheid, Jr., being duly sworn according to law, deposes and says that he is one of the attorneys for the appellee, and that the foregoing Petition for Reargument and statements made therein are all presented in good faith and that the said petition is not filed for the purpose of delay.

William F. Scheid, Jr.

Sworn to and subscribed before me this 2nd day of May, A. D., 1969.

Katherine Brancato
Notary Public
Philadelphia, Philadelphia Co.

My Commission Expires January 20, 1971.

APPENDIX B-4

IN THE SUPREME COURT OF PENNSYLVANIA
Eastern District

No. 149 January Term, 1969

Brann & Stuart Company

vs.

Consolidated Sun Ray, Incorporated,
Appellant

and

Philadelphia Redevelopment Authority

Appeal from Judgment of Court of Common Pleas No. 2 of Philadelphia County (Tried in Common Pleas Court No. 8)

ANSWER OF CONSOLIDATED SUN RAY, INCORPORATED, APPELLANT, TO THE PETITION OF BRANN & STUART COMPANY, APPELLEE, FOR REARGUMENT

To the Honorable, the Justices of the Said Court:

In answer to the Petition for Reargument of Brann & Stuart Company, appellee, in the above matter, Consoli-

dated Sun Ray, Incorporated, appellant, respectfully avers that all of the arguments and conclusions contained in the said petition were presented to this Court by appellee in its brief and oral argument, as is admitted by appellee in its petition, and it is averred that no relevant point therein was overlooked or misunderstood by this Court.

Therefore, the Petition for Reargument should be dismissed.

Respectfully submitted,
(s) Morris Wolf
(s) Michael L. Temin
Attorneys for Appellant

Dated: May 7, 1969.

APPENDIX B-5

ORDER

Petition for Reargument

May 9, 1969, Petition Denied.

Per Curiam